

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 05-44481-rdd

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5 In the Matter of:

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7 DPH Holdings Corp., et al.,

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9 Debtor.

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13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

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18 December 18, 2012

19 10:06 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Notice of Agenda Proposed Fifty-Eighth Claims
2 Hearing Agenda

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4 Hearing re: Notice of Agenda Proposed Eightieth Omnibus
5 Hearing Agenda

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7 Hearing re: Adversary proceeding: 07-02236-rdd Delphi
8 Corporation, et al. v. DSSI, et al. Notice of Agenda
9 Proposed Adversary Proceedings Hearing Agenda

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11 Hearing re: Reorganized Debtors' Motion For Leave To File
12 Modified Amended Complaint

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14 Hearing re: Certificate of Service Regarding Re-Notice of
15 Reorganized Debtors Motion For Leave To File Modified
16 Amended Complaint

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25 Transcribed by: Rebecca Sharp

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1 P R O C E E D I N G S

2 THE COURT: Okay. In re: DPH Holdings.

3 MS. HAFLEY: Good morning, Your Honor. This is
4 Cynthia Haffey on behalf of the Plaintiff. And Your Honor,
5 if I could I'll first go through the Agenda for the day.
6 There are no continued or adjourned matters, and there are
7 no uncontested, agreed, withdrawn, or settled matters,
8 uncontested, agreed, withdrawn, or settled matters. So
9 before you today is the contested matter regarding the
10 reorganized debtors motion for leave to file an amended
11 complaint against DSSI.

12 Before I proceed on our motion for leave to amend,
13 I would like to give the Court an update on where we, the
14 status of the preference actions in total are. It's been
15 about seven months since we were before the Court and gave
16 our last update.

17 THE COURT: Okay.

18 MS. HAFLEY: At that time, and that was in May of
19 2012, there were 43 actions remaining. Since that time the
20 parties have been working diligently in trying to resolve
21 the cases and today there are 21 cases remaining. Two of
22 those 21 have been resolved in principle and I anticipate
23 that we'll have a stipulated order of dismissal before the
24 Court if not before the end of the year, just shortly after
25 the new year. Five of those 21 cases are what I refer to as

1 inactive cases. They are cases where the defendants are no
2 longer actively in business. They did initial file an
3 answer to this complaint, but they have since stopped doing
4 business. So that really leaves 14 active cases. And of
5 those 14 we have meet and confers scheduled with three of
6 the defendants this week, and another two scheduled between
7 now and mid-January. We have potential mediation scheduled
8 also at the end of January.

9 So if we remain as successful as we have been in
10 meeting and conferring and the parties working together, I'm
11 optimistic that by the end of January we will have reduced
12 that number to less than ten active cases remaining.

13 THE COURT: And are those proceeding pursuant to
14 the procedure's order?

15 MS. HAFLEY: They are, Your Honor.

16 THE COURT: Okay.

17 MS. HAFLEY: The first process under the
18 procedure's order is for the parties to conduct a meet and
19 confer. And if the meet and confer is not successful we
20 have then moved on to mediation. In a couple of those
21 matters, well actually several of the matters, the parties,
22 the counsel have been working together prior to the formal
23 meet and confer to try to narrow the issues so that when our
24 clients get together --

25 THE COURT: Okay.

1 MS. HAFFEY: -- we can really have a very meaty
2 and substantive discussion. Those discussions, pursuant to
3 the order, can be telephonic. But we have held several in
4 person with counsel and that has definitely helped the
5 process.

6 THE COURT: But the nine that are not in the meet
7 and confer/mediation stage, have they gone past it? Or are
8 they still waiting for it?

9 MS. HAFFEY: Only one has gone past it and that's
10 the one that will likely have the mediation at the end of
11 January. That's the date that the parties are talking --

12 THE COURT: Okay. All right.

13 MS. HAFFEY: -- and we've already started talking
14 about selection of the mediator. And I apologize, Your
15 Honor, I woke up this morning with a head cold.

16 THE COURT: Okay.

17 MS. HAFFEY: So I apologize. With me today are my
18 colleagues Bruce Sendek and David DeVine. And depending on
19 the issues that are before The Court, The Court would like
20 to have addressed, they may also be participating today.

21 THE COURT: Okay.

22 MS. HAFFEY: So briefly a procedural history, just
23 to remind The Court. We originally filed a motion for leave
24 to amend, and it was heard by The Court in June of 2011.
25 And at that time The Court found, with one small exception,

1 that the form of the DAS complaint met the Twombly Iqbal
2 pleading standards. And that one narrow exception was to
3 DSSI and as to whether or not we had pled antecedent to
4 that. Subsequent to that --

5 THE COURT: And that's because the chart attached
6 to that complaint was basically blank on that issue with
7 regard to DSSI?

8 MS. HAFLEY: There was a chart attached to the
9 back of the complaint and it did provide the obligor
10 information and it did provide dates and the transfer
11 amounts. What it didn't provide, as did most of the other
12 complaints, was a list of either invoices or purchase
13 orders.

14 THE COURT: What it was on account of?

15 MS. HAFLEY: That's correct.

16 THE COURT: Right.

17 MS. HAFLEY: So subsequent to the June hearing,
18 the parties were before the Court on another matter in
19 October of 2011. And as part of that hearing this Court
20 ordered the parties to get together and to negotiate a
21 procedures order. And that's the procedures order we were
22 talking about just a moment ago. It took the parties
23 several months to negotiate the procedures order because of
24 the number of defendants and their involvement. DSSI was
25 invited to participate. They did in some extent participate

1 by providing mediator names. And the procedures order then
2 was entered by The Court, I don't have the date in front of
th
3 me right now. Was it February? February 12 . And in the
4 procedures order it did provide that DPH could provide that
5 antecedent, that information if it was missing in any
6 particular complaint exhibit.

7 Prior to the Court entering the procedures order,
8 however, DSSI did file a motion to dismiss with prejudice.

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9 And that motion was heard on May 12 of this year. And
10 during that hearing, and it is, I've got the transcript in
11 front of us, I think that the Court was clear that what was
12 left and remaining, we were provided the opportunity by the
13 Court to file a motion to seek leave to modify the amended
14 complaint. And what would be remaining as to whether or not
15 we have now met that Twombly Iqbal standard in pleading
16 antecedent. And in fact the Court asked the parties to
17 please meet for us to know counsel for DSSI the exhibit.
18 And this Court said that, and hopefully if the parties could
19 agree, and stipulated that it now passed Rule 12 muster,
20 that we would move on and that DSSI would be subject to the
21 procedures order.

22 THE COURT: I also, I think there's one missing
23 step in all of this, although maybe you were going to get to
24 it, which is, at least as I recall, there wasn't an order
25 submitted, proposed order submitted after the June, 2011

1 hearing specifically denying without prejudice for leave to
2 amend the first motion by DPH for leave to amend as to DSSI.
3 And so that was sort of hanging there open.

4 MS. HAFHEY: And I think equally the Court on the
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5 May 12 hearing also said to the defendants that defendants
6 had not entered an order dismissing their action as they
7 believed had happened during the June hearing. And Your
8 Honor stated at that hearing that he could understand how
9 there was this misconception between the parties. And we
10 were working then towards the procedures order and felt that
11 we had tied that up. Because the procedures order has a
12 process for defendants that are referred to as Rule 15
13 defendants that did make prejudice arguments. And after the
14 meet and confer, mediation, the next step then is a Rule 15
15 hearing with The Court. Or another track is for those
16 defendants that didn't make defenses as to Rule 15, and they
17 move right into a merits track and go right from the meet
18 and confer mediation right into a trial with this Court.

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19 So my understanding of the May 12 hearing was
20 that Your Honor recognized that there was some confusion
21 amongst both counsel. And we thought that we had taken care
22 of it through the procedures order but the Court recognized
23 that DSSI understood differently. And the Court permitted
24 us to file this motion, again, on that narrow issue as to
25 whether or not we have now sufficiently pled the antecedent

1 debt.

2 THE COURT: Okay.

3 MS. HAFLEY: And --

4 THE COURT: The order itself, and there was some
5 back and forth on this and so there is actually a corrected
6 order from August of 2012, but that reflects the back and
7 forth from the parties in response to the first order that
8 was entered in May. But -- I'm sorry, in June of 2012. But
9 the order itself doesn't limit the objection to the Rule 15
10 issue, just to the issue of antecedent debt. But looking
11 back as far as the 2011 hearing, I think that that frankly
12 was the reason that I did not grant the motion to amend and
13 instead had the dismissal without prejudice.

14 MS. HAFLEY: And it's my reading on DSSI's briefs,
15 and I'm sure they will speak for themselves on this matter,
16 but in their reply they do say that that is their
17 understanding as well, at least that's my reading of it.
18 And that they did make those additional arguments that the
19 Court had originally heard in June of 2011 to preserve them
20 for appeal. So again, the issue for the Court today is
21 whether or not the new exhibit and the complaint does state
22 a claim against DSSI. So if we could jump right to that,
23 Your Honor? Unless you have any questions beforehand?

24 The complaint, the modified first amended
25 complaint is in the form, substantially the form of the

1 complaint that this Court reviewed in June of 2011, and
2 again in which the Court found that we had sufficiently
3 stated a claim. As to the exhibit, we have provided we
4 believe more information than what was provided on those
5 complaints that The Court found was sufficient back in 2011.
6 The first exhibit again is a chart which provides the
7 transfer, the obligor, the transferee, the date of the
8 transfer, and the amount of the transfer, the type of
9 transfer. And this, Your Honor, is Exhibit No. 1 to the
10 proposed amended complaint.

11 THE COURT: It's actually Exhibit No. 1, but it's
12 Exhibits No. 1A through 1F.

13 MS. HAFLEY: That's correct.

14 THE COURT: Because you have sent them transfers.

15 MS. HAFLEY: The page that I'm referring, the
16 specific document I'm referring to right now is the one
17 that's just under Tab 1.

18 THE COURT: Right.

19 MS. HAFLEY: And were provided to the obligors and
20 the dates and the transfer amounts. And those are the same
21 transfer amounts that were on the original complaint and the
22 dates that were on the original complaint. What we've added
23 then in the antecedent debt column is a reference then to
24 exhibits, to this document. So if you were then to turn to
25 Exhibit No. 1A, and again this is to show that the debt was

1 antecedent. It provides in this document that this is
2 payment to DSSI to cover, and this is -- I'm sorry, what,
3 the Court?

4 THE COURT: No, go ahead.

5 MS. HAFLEY: It's in the second line of an email.
6 And it says to, payment for invoice, past due invoices. And
7 it references Delphi Mexico, TNI, and ENS. All divisions,
8 Your Honor, of DAS. And we've attached additional
9 information on this, behind 1A. On the next is an email
10 between the parties, and it's specifically from Margaret
11 Waddington (ph) who, I believe, her email states that she
12 was the Controller of DSSI at the time. And the subject
13 line talks about that we need your, basically your bank wire
14 information to pay wire advances on those past due invoices.
15 So again, reflecting that this is an owed debt by the
16 Plaintiff to DSSI. And it's in the dollar amount that is
17 pled in the complaint. And then next we have a document
18 that we refer to as a wire room document. And again, still
19 under 1A. And it is from DAS. Cynthia Hewlitt (ph) is
20 authorizing the payment to DSSI. And it's to their bank,
21 Bank One. It did have their ABA number on there. But
22 because of, we were filing this, you know, as a public
23 record, I redacted that banking number for DSSI's, you know,
24 didn't want to put their wire information out there. But
25 that was their ABA number. And if you'll notice, there's a

1 notation down in the bottom box that says past due. So all
2 combined these several documents under Tab 1A I think
3 clearly reflect that the transfer made on that date to DSSI
4 by DAS were for past due invoices.

5 We have the same scenario to 1B, then. And again
6 to 1B, going back to the Exhibit No. 1, is for a transfer on
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7 September 19 in the amount of \$2,000,616. And again it
8 talks about it is a wire. And this document again
9 discusses, on let's see where, they are talking here about
10 executing an agreement for payment on past due invoices.
11 And in the subsequent page again is a DAS document showing
12 that DAS is authorizing the transfer of the payment to DSSI
13 for \$2,000,600 and some odd change. And if you flip back to

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14 the next page, which is dated September 19 , it again talks
15 about this payment going to, from an MNS2 payment cycle to
16 what they call a net immediate, but it's not a net immediate
17 in a COD sense, as DSSI is trying to state in their brief to
18 the Court. It is a net immediate meaning that we are moving
19 from MSN 2 payments to something quicker. But it's still a
20 past, it's still a payable. MNS2, the Court is probably
21 familiar but let me just remind the Court, means that it's a
22 payment that is made second, on the second day of the second
23 month after the services are received. So in other words,
24 if the service, a service is performed in August, the normal

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25 payment for that would be October 2 . If the payment, if

1 the service was received in July, the payment then would be
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2 on September 2 . So here what they are saying is we are
3 moving from MNS2 payments to a quicker payment timeframe.
4 And when it refers to an advance payment what it is
5 referring to is, again, we are moving in advance of what

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6 normally would be paid on, I think this one was October 2 .
7 We're moving it up quicker. But it's already a past due
8 invoice.

9 THE COURT: Is part of that interpretation based
10 upon the agreement that's attached as Exhibit No. 3?

11 MS. HAFLEY: It is, Your Honor.

12 THE COURT: Okay.

13 MS. HAFLEY: Also in the body of the document that
14 I'm referring to does talk, however, about paying the
15 balance of past due invoices.

16 So then if we move on to tab C, which is four, the
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17 third transfer that was made on September 28 . And again,
18 these are the same transfer amounts and dates that were in
19 the original complaint. This is a screen shot. And I
20 apologize that it's not as easy to see when it's been
21 photocopied. From the DAS payment records, and it's
22 showing, reflecting this amount being paid. And the email
23 then that follows talks about this is for DSSI to cover
24 invoices for last week that should be set for immediate
25 payment per our settlement agreement. And again, immediate

1 payment does not mean COD. Immediate payment according to
2 Exhibit, I think it's No. 3, of our complaint means, I think
3 it's seven to eight days. Is that correct? Seven days? So
4 it's not COD.

5 THE COURT: I'm sorry. It's not, you said net?
6 Or not COD?

7 MS. HAFLEY: It is not COD.

8 THE COURT: Not COD, okay.

9 MS. HAFLEY: So the last document in, under tab C,
10 again is one of those what we call wire room forms. Again,
11 showing that it was DAS that was the obligor, making the
12 payment, making it to DSSI's bank. I apologize, I did not
13 redact your ABA number there. And it says in the bottom
14 payment of payables under payment terms, under deviation
15 request. And of course, payables means something that is
16 already owed and due.

17 Similarly under Tab D, we have the same form.
18 Again, it reflects the amount of the line, I think it's the
19 fourth line down, which is for \$220,538. That is the amount
20 in this form. Again, it's from DAS, from Ms. Cynthia
21 Hewlitt. And again, they are wiring the money to DSSI and
22 down in the bottom, payment of payables. Again, reflecting
23 that these are for amounts already owed.

24 E is for the, I think it's the fifth line down,
25 yes, and it is for an amount of \$512,885. Again, this is a

1 screen shot as part of that payment. The second one is hard
2 to see. You can see it kind of in the whited out. And
3 again, this says it covers payment originally requested for
4 Friday and not made, plus additional amounts due today, and
5 amounts shown as due on 11/2 but are now due under agreement
6 with DSSI. So again, referencing the agreement with DSSI

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7 that they would have been due on November 2 but that
8 payment has been moved up in advance. And payments were
9 only due on MNS2 after services were provided.

10 And then we move on to F, which is \$4,217,178.75.
11 Again, the same screen shot information. The email itself
12 references invoices that are covered by this request.
13 Again, invoices only reflect payables that are out there.
14 And it has again information where it's going to DSSI's bank
15 account. That the following form, again, is from DAS to Ms.
16 Hewlitt, again representing the dollar amount that I just
17 stated at \$1,217,178.75. And the indication at the bottom
18 says payment of invoices on net immediate terms to DSSI.
19 Again, net immediate does not mean COD. Net immediate means
20 to be paid after seven days.

21 And then finally, G is for \$546,990. And that is
22 the dollar amount that is referenced again on Exhibit No. 1.
23 And this again is the wire room payment form that shows that
24 DAS made the payment on that date to DSSI, wired it to their
25 bank. And the reason was for payment of invoices on net

1 immediate terms to DSSI. And again, things are only
2 invoiced when services were performed in net immediate under
3 that agreement and in seven days.

4 THE COURT: Can I go back to E? Is it E?

5 MS. HAFLEY: Sure.

6 THE COURT: If you look at the description on
7 this, it says this covers payment originally requested for
8 Friday and not made. And that to me sounds like antecedent
9 debt.

10 MS. HAFLEY: Right.

11 THE COURT: And then it says plus additional
12 amounts due today, and amounts shown as due on 11/2 but due
13 now under our agreement with DSSI. And the date of this
14 email is October 2.

15 MS. HAFLEY: Correct.

16 THE COURT: So how could those two categories be
17 antecedent debt?

18 MS. HAFLEY: Well a payment that would have been

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19 due today, that Monday, October 3 , would have been a normal
20 MNS2 payment. So it would have been services that were
21 provided in August.

22 THE COURT: Okay. Or at least --

23 MS. HAFLEY: And then --

24 THE COURT: Yeah, because it's October 3 --

25 MS. HAFLEY: Exactly. And because it's a Monday

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1 it wasn't the 2 , it was the 3 for that month.

2 THE COURT: And what about the last thing?

3 MS. HAFLEY: The last one, where it says on 11/2,
4 that means services were performed in September and the
5 email --

6 THE COURT: Well it says 11/2, though.

7 MS. HAFLEY: Well that's what it's saying. They
8 normally would be due on 11/2, because that's the MNS2 date
9 for services in September. The second month after. And

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10 because this email is dated October 3 , we know those
11 services were already performed.

12 THE COURT: You say they would originally be
13 payable on November 2 ?

14 MS. HAFLEY: Under the old MNS2 terms.

15 THE COURT: Okay.

16 MS. HAFLEY: So we believe those documents alone,
17 Your Honor, provide fair evidence of the antecedent debt
18 here. Those documents, maybe not every single one of them,
19 but definitely a selection for each of the line items, were
20 provided to DSSI's counsel before that June, 2011 hearing if
21 you recall my telling you that at that time.

22 We attached Exhibit No. 2 so we could provide DSSI
23 for the purchase orders that, for the full complement of the
24 wires, the amount transferred, those are the purchase
25 unders, those are the dates of the services, and the amount

1 of the transfer. And then third, we provided to The Court
2 the agreement that we have been referring to here.

3 THE COURT: Let me make sure in Exhibit No. 2 I
4 understand this. The first seven items correspond to the
5 items on Exhibit No. 1?

6 MS. HAFLEY: That's correct.

7 THE COURT: And then under the column purchase
8 order it says see below. So you are saying that the see
9 below is when you get down to specific orders, those orders
10 are covered by the see below language?

11 MS. HAFLEY: It's the detail that make up those
12 wire transfers and invoices that were paid under --

13 THE COURT: So see below is a cross reference to
14 these actual purchase order numbers?

15 MS. HAFLEY: That's correct.

16 THE COURT: There are four other transfers that
17 say see below. So I guess, that are below the first seven.
18 I guess I'm assuming those are also, the detail is also for
19 those? You know, there is one for \$29,273, then one for
20 \$33,000. They are not by wire transfer, they are by it says
21 AFC 46722 for the first one there?

22 MS. HAFLEY: That is my understanding, Your Honor,
23 that that is correct.

24 THE COURT: So there is detail for those also
25 below?

1 MS. HAFLEY: That is my understanding.

2 THE COURT: Okay. Okay. And then Exhibit No. 3
3 is the settlement agreement between Delphi Corporation and
4 DSSI, LLC?

5 MS. HAFLEY: And it's actually a settlement
6 agreement, an agreement, Your Honor, not a settlement, an
7 agreement between Delphi Corporation together with its
8 affiliates and its subsidiaries.

9 THE COURT: Right. Which are all collectively
10 defined as Delphi.

11 MS. HAFLEY: That's correct. So it includes DAS.
12 So --

13 THE COURT: And then the payment obligations are
14 by Delphi?

15 MS. HAFLEY: I'm sorry?

16 THE COURT: All of the references then in the
17 agreement itself, as well as the recitals where it says for
18 example company, which is DSSI, believes that Delphi, which
19 is Delphi Corp. and its subsidiaries.

20 MS. HAFLEY: That's right.

21 THE COURT: Yeah.

22 MS. HAFLEY: So Delphi Corp. and its subsidiaries,
23 the reading of this agreement shows that DAS is an obligor
24 under this agreement, alone as to any payment that came

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25 after September 16 . But as I stated earlier --

1 THE COURT: Well it doesn't necessarily say that,
2 but one could infer that.

3 MS. HAFLEY: That's correct.

4 THE COURT: And then for example the payment
5 provision, there's one payment provision in paragraph 2A
6 that says Delphi shall pay. So I guess there's an inference
7 from that that some Delphi entity shall make that payment.
8 And you are saying that you have the record of DAS making
9 the payment?

10 MS. HAFLEY: That's correct.

11 THE COURT: Okay. And you are saying DAS is the
12 creditor because they made the payment?

13 MS. HAFLEY: That is correct.

14 THE COURT: They wouldn't have done so otherwise.

15 MS. HAFLEY: It was the obligor, that's correct.

16 THE COURT: They are not in the business of making
17 gifts.

18 MS. HAFLEY And we have purchase orders that I
19 could share with the Court if necessary that shows, you
20 know, purchase orders between DSSI and some of these DAS
21 divisions that I referred to earlier. The ENS and the TNA.

22 THE COURT: But they are not necessarily divisions
23 of DAS. That there maybe other entities too, like this
24 Mexican company.

25 MS. HAFLEY: Those divisions that are referred to

1 are divisions of DAS?

2 THE COURT: The invoices are all divisions of DAS?

3 MS. HAFFEY: When I spoke earlier in regards to

4 the one email that was attached, I think, as to tab 1A,

5 referred to ENS and TNI. And I think it's Delphi Mexico.

6 And I know that DSSI has taken the entities other than DAS,

7 and those are divisions of DAS.

8 THE COURT: Well, I was asking a slightly

9 different question. Which is the invoice numbers that are

10 attached, do they have the, are they to the specific

11 obligor? I mean, can you see from the invoice numbers who

12 it is to? I'm assuming you can, because it's an invoice.

13 MS. HAFFEY: They are actually purchase order

14 numbers that are on Exhibit No. 2.

15 THE COURT: I'm sorry. Purchase numbers and

16 therefore have a specific purchaser, excuse me. Right? Or

17 not?

18 MS. HAFFEY: Again, it would very likely reflect

19 under DAS the division of DAS.

20 THE COURT: Okay.

21 MS. HAFFEY: So Delphi having its energy and

22 systems, I think, that my client just showed me? That's a

23 division of DAS.

24 THE COURT: Okay.

25 MS. HAFFEY: So the divisions and plants

1 themselves issue purchase orders.

2 THE COURT: Okay.

3 MS. HAFLEY: Unless you have any further
4 questions, Your Honor?

5 THE COURT: Okay.

6 MR. BOWLES: Chip Bowles, Bingham Greenebaum Doll
7 for DSSI. And I'm going to start with basically an
8 overview, which is, my clients, Your Honor, have generally
9 been confused in this case. And when Ms. Haffey was going
10 back in the record, let me just start with the fact that if
11 you might remember way back in June, 2011 we were sort of
12 decided as the unique person. And we were unique not
13 because there were blanks in our Exhibit No. 1. We didn't
14 even have a column, Your Honor, for antecedent debt. We
15 were more unique because there were several other people
16 situated like that. Because DAS, as the Plaintiff,
17 affirmatively stated in that first amended complaint motion,
18 and in the first amended complaint, that they had no
19 evidence of antecedent debt. They stated that the only
20 evidence they believed that might exist was on information
21 and belief held by my client, DSSI.

22 At the June hearing, and at the last May hearing,
23 you said when we were discussing about this, my clients
24 don't have to prove their case for them. And that's what
25 we've been faced with all along. Because Your Honor, you

1 are correct that the main issues here are antecedent debt.
2 But it still comes down to two forms of antecedent debt.
3 And when I say that, you know, we've been confused, Ms.
4 Haffey's presentation has sort of confused us more. Because
5 one thing she said, and we are looking at the documents
6 filed in this case, is that Delphi Mexico is a subsidiary of
7 DAS.

8 THE COURT: No, she said it was a division.

9 MR. BOWLES: A division of DAS. But looking at
10 the org chart filed in this case, I believe all
11 international ones came under a different division other
12 than DAS. So I'm not certain that, you know, and certainly
13 there's no allegations in the third amended complaint as to
14 that fact.

15 THE COURT: Does it matter if DAS made the
16 payment?

17 MR. BOWLES: Yes it does, Your Honor, for two
18 reasons. Remember, Your Honor, this is a unique case in
19 another reason. If this was a normal case, like the Enron
20 case, you would have either preferences or you would have
21 constructed fraudulent conveyance where the debtor entity
22 who was the transferor paid a debt it did not owe. One is
23 either going to be constructed fraudulent conveyance because
24 they got no benefit, or it's going to be a preference
25 because they paid a debt they owe. Remember Your Honor, DAS

1 and all the other Delphi entities decided for reasons a long
2 time ago to waive all constructed fraudulent conveyances.
3 So it does become very important.

4 The only way they can prevail here, Your Honor, is
5 to specifically be able to show under Iqbal and Twombly
6 that there is an antecedent debt owed by either DSI or DTI.
7 Remember, this isn't one where they said DAS and other
8 entities. They simply said DAS and DTI are the only ones
9 that have entered into service agreements here.

10 Your Honor, this is from their complaint. I don't
11 have to go any further on that. So going to the first issue
12 --

13 THE COURT: Well they don't say DAS has entered
14 into service agreements. They just say DAS became obligated
15 --

16 MR. BOWLES: Actually what they say is if you look
17 at paragraph 13, Your Honor, they said Plaintiff was the
18 operating subsidiary of Delphi North America. Plaintiff is
19 DAS. And then you go to paragraph 13. Plaintiff and DTI
20 entered into certain service agreements with the Defendants
21 for the performance of various services.

22 THE COURT: And Plaintiff assumed or otherwise
23 became obligated --

24 MR. BOWLES: Became obligated --

25 THE COURT: -- so I read that to say Plaintiff

1 entered into certain of them, DTI entered into certain of
2 them, it's not clear that both of them entered into all of
3 them.

4 MR. BOWLES: Oh I'm not requiring both, but --

5 THE COURT: But in any event, Plaintiff became
6 obligated for all the payment obligations --

7 MR. BOWLES: But what you've hit on, Your Honor,
8 is the thing there are only two entities we are really
9 talking about.

10 THE COURT: Right.

11 MR. BOWLES: DTI and DAS itself. If it went to
12 any other Delphi entity, that's not the subject of this
13 lawsuit. At least, so if it went to --

14 THE COURT: Unless DAS was obligated on it.

15 MR. BOWLES: But remember, Your Honor, you said
16 that you wanted to have in your initial dismiss order an
17 identification of who was in fact the obligor, the
18 transferrer. We know DAS paid the money. But in this case
19 they decided to limit the world just to DAS and DTI.

20 THE COURT: Right.

21 MR. BOWLES: So one of the main issues there is
22 just looking at the corners and the list of things we have
23 here, there is nothing that really says that DAS and DTI
24 really owned this money that were the subject of any of
25 these transfers.

1 THE COURT: paragraph 13 in the invoices. Or the
2 payment, or paragraph 13 and the payable numbers refer to --

3 MR. BOWLES: Ah, but the payable numbers, and that
4 would be Exhibit No. 2, not Exhibit No. 1. Our statement,
5 and I'll go through Exhibit No. 1 later if you'd like Your
6 Honor. But all Exhibit No. 1 does is go through and set
7 forth, here we want you to pay this money, DAS, to the
8 Daycorp system.

9 THE COURT: Right.

10 MR. BOWLES: If you want I can go through in
11 order. I can address Exhibit No. 2 now. But I'll go to
12 Exhibit No. 2. Exhibit No. 2, Your Honor, is basically an
13 exhibit that has a few sets of columns on it. The first and
14 most interesting is not really a column of Exhibit No. 2 but
15 is instead what they have not talked about. Down in the
16 corner on Exhibit No. 2 you will find that there is a date,
17 and it shows a June date of 2012.

18 Now Your Honor, here is one of the issues we've
19 had which we've been going through all this. This
20 information apparently did not exist in any usable form,
21 unless we believe that Ms. Haffey somehow misspoke at the
22 earlier thing, at the time the bankruptcy was being filed, I
23 mean the first amended complaint was being filed. Because
24 they stated in their, under Rule 11, we have no evidence in
25 our possession, on information and belief we believe these

1 orders exist in the hands of the Defendants. Which Iqbal
2 Twombly and this Court has rightly said this is now what
3 they can do.

4 Your Honor, the reason that is important in this
5 case is this is going to be, if we ever have to get to it, a
6 case where we're looking for the antecedent debt. We're not
7 here to defend just a transfer. We're here to defend
8 whichever alleged debts each one of those seven transfers
9 dealt with. The best Ms. Haffey has said is, gee, Exhibit
10 No. 2 purports to show preexisting debts. But look at
11 Exhibit No. 2. You've got a date column. It doesn't say
12 anything about what that date is for. Ms. Haffey orally
13 argued it was the date the services were provided. But if
14 you read entirely Exhibit No. 2 and every inch of their
15 pleading, they don't say that. In fact, Your Honor, if you
16 look at their pleading and go over to paragraph 22, where
17 they were talking about it, they don't even allege that the
18 Plaintiff owed the antecedent debt. It says Plaintiff made,
19 or caused to be made, each transfer, the transfers were the
20 seven payments on Exhibit No. 1, for or in account of an
21 antecedent debt owed to each Defendant. Not owed by DAS --

22 THE COURT: They say it in paragraph 13.

23 MR. BOWLES: But in, but look at paragraph 22.

24 Because paragraph 13, and this is where we are getting down
25 to factual versus the statements that were made in Iqbal and

1 Twombly. Here they only say that we entered into certain
2 service agreements. They don't provide any evidence of
3 where those agreements exist. On the service agreement
4 issue Ms. Haffey addressed in their reply a very simple, she
5 said, well wait a minute, service agreements means purchase
6 orders. But Your Honor, in the June hearing you
7 differentiated between service agreements. Because there
8 were many Defendants here, not us among them, who said wait
9 a minute, our service agreement, in other words an agreement
10 to provide you the services, agreement to provide goods,
11 agreement to provide whatever, would be assumed in its
12 entirety. Ms. Haffey said no, there are two different
13 things. A service agreement level and a purchase order
14 level. They have not alleged that there were any agreements
15 between there. So I don't think 13 gives you the factual
16 plausibility that you need to have on this. Certainly even
17 if it refers to Exhibit No. 2, Your Honor, you still have
18 the problem of the date.

19 THE COURT: Isn't a purchase order a payment
20 obligation?

21 MR. BOWLES: Is a purchase order a payment
22 obligation? As a general rule, yes. But then the question
23 becomes who owes it? Which there is still no obligor.

24 THE COURT: All right. So isn't step one show me
25 the purchase orders? And then you make a summary judgment

1 motion?

2 MR. BOWLES: Well the answer to that, Your Honor,
3 is that would still have to go through discovery. And
4 that's what Iqbal Twombly said.

5 THE COURT: Yes, you do. But does a complaint
6 have to actually attach the purchase orders? No.

7 MR. BOWLES: No.

8 THE COURT: All right. So this seems to me to be
9 pretty specious to me. You know how to defend against this.
10 In fact, you have already started to.

11 MR. BOWLES: No --

12 THE COURT: You have started to allege that Delphi
13 Mexico is in fact a separate subsidiary and there was no
14 payment on account of antecedent debt. Show me where DAS is
15 liable for it, and if they can't do it you win on summary
16 judgment. You know what? I said in the May transcript that
17 I would not be happy if I got a complaint that basically
18 gave you the information so that you can defend. I'm not
19 happy. I appreciate that this has taken a long time. I was
20 very clear at the last hearing that the blame for that is on
21 both parties, but it's not really blame because I think both
22 parties have been dealing in faith. But I just, to me this
23 is a valid complaint.

24 MR. BOWLES: And if that is Your Honor's thing, I
25 will not waste The Court's time then.

1 THE COURT: Okay. All right. Good. I rule in
2 favor of the debtors, having reviewed the exhibits and the
3 complaint. To me, this passes Iqbal and Twombly. I've
4 already laid out the standard Iqbal and Twombly ad nauseam.
5 It's also laid out in the Hydrogen (ph) case by Judge
6 Gonzalez, which completely agrees with what I've laid out on
7 the record.

8 These exhibits, combined with the complaint, may
9 or may not ultimately establish a case. But they certainly
10 set forth the basis for the debtors asserting that this is
11 antecedent debt. And clearly it is supplemented, although
12 it didn't have to be, but I believe it is supplemented by
13 Exhibit No. 3 which shows that there was enormous pressure
14 being placed on Delphi to pay antecedent debt. So yes,
15 maybe ultimately you can show as a defense that it was
16 substantially contemporaneous, and intended by the parties
17 to be contemporaneous. Or you can refute their allegation
18 that it was in respect of an antecedent debt of DAS. But
19 the payments were by DAS.

20 They have asserted in Exhibit No. 2 that they have
21 purchase orders responding to those payments by DAS. They
22 will show whether they are on behalf of DAS or one of its
23 divisions, or of a third party. And they will have to show
24 then, obviously, some backup for their support that in fact
25 DAS was the party that assume obligations for this

1 notwithstanding that. But I'm not prepared to nip this in
2 the bud. In essence under Rule 12(B)(6) and Rule 8 as part
3 of a motion under Rule 15 for leave to amend. To me this
4 lays out sufficient factual support that these debts are
5 antecedent debts and that they are owed by the Plaintiff,
6 DAS. So you can submit the order to make the motion.

7 MS. HAFLEY: Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. BOWLES: Thank you, Your Honor.

10 MS. HAFLEY: Thank you.

11 (Whereupon, proceedings concluded at 10:45 a.m.)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Rebecca Sharp, certified that the foregoing transcript is
a true and accurate record of the proceedings.

Veritext

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Mineola, NY 11501

Date: December 20, 2012